TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~378.~~ 165

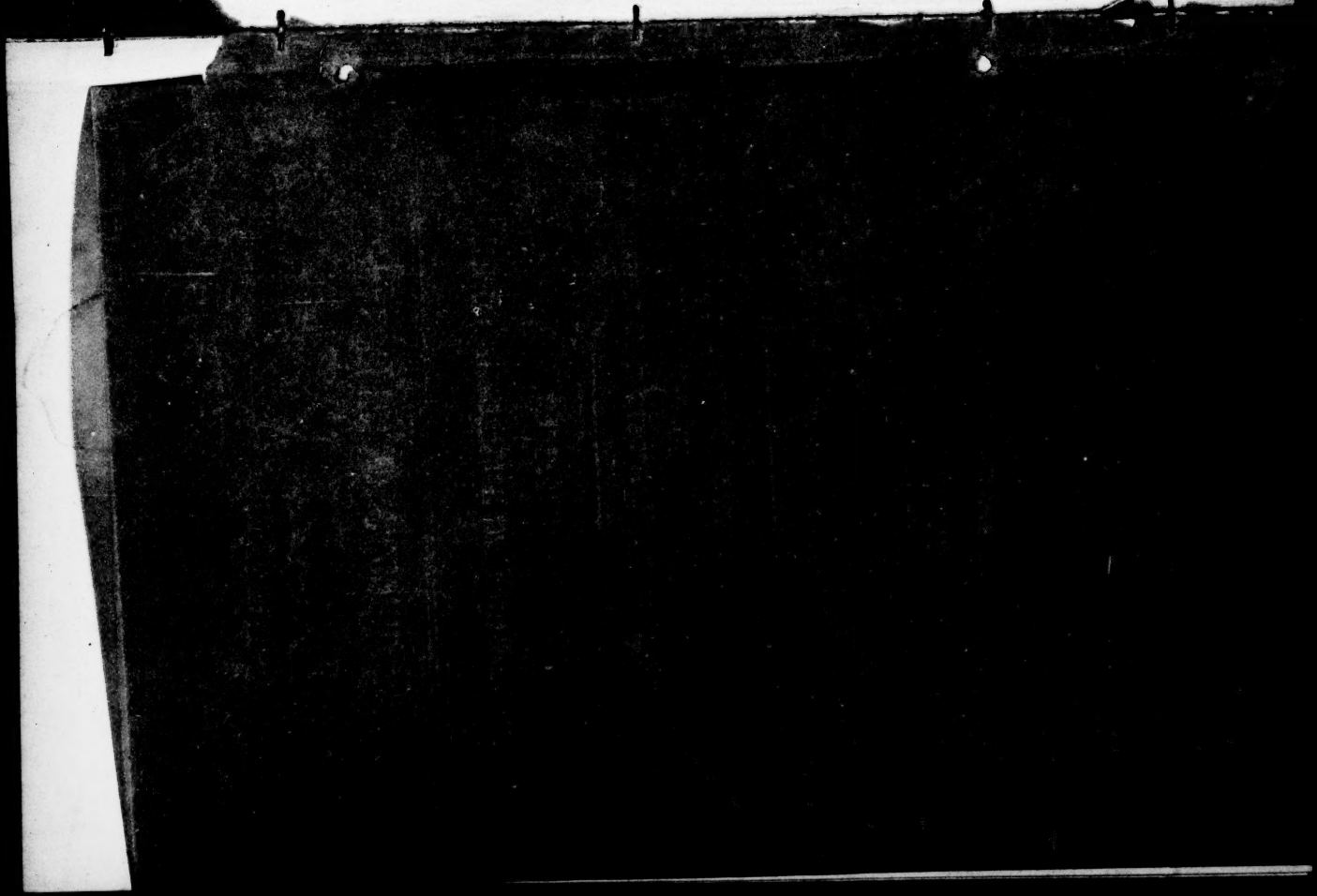
FREDERICK Z. SALOMON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 10, 1872.



SUPREME COURT OF THE UNITED STATES.

No. 378.

FREDERICK Z. SALOMON, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

FREDERICK Z. SALOMON
vs.
THE UNITED STATES. } No. 6130.

To the honorable the United States Court of Claims:

The petition of Frederick Z. Salomon, of the city of Denver, county of Arapahoe, and Territory of Colorado, respectfully showeth to your honors:

That your petitioner, on the 28th day of July, 1864, entered into a contract, under seal, with assistant quartermaster Captain Loudon Mullin, of the United States service, for and in behalf of the United States, he for that purpose being duly and lawfully thereunto authorized and empowered, whereby your petitioner contracted, covenanted, and agreed to deliver at Camp Fillmore, in said Territory, twelve thousand bushels of corn, at fifty-six pounds per bushel weight, well matured, and secured in sacks, to be good sound merchantable corn, and to be subject to inspection by the officer receiving said corn on behalf of the United States, and to be delivered at such times and in such quantities, of not less than a thousand bushels per month, as the assistant quartermaster at said post might direct, the first delivery to commence in September, 1864. And the United States, on its part, covenanted, promised, and agreed to pay your petitioner the sum of 11 cents per pound for all the corn so delivered and accepted under said
2 contract, to be paid for in current funds of the United States, when delivered; or, if the officer receiving it not being in funds, then to be paid as soon thereafter as funds might be furnished.

And your petitioner avers, that he delivered at Camp Fillmore, in the month of September, 1864, six hundred and forty-nine bushels of corn, of the weight, character, and quality specified in said contract, in sacks, to the proper officer at said post authorized to receive it for the United States, and the same was duly examined and inspected by a proper officer of the United States and found to be conformable to said contract, and was accepted by the United States in fulfillment of said contract. And the officer not having funds in his hands at the time of delivery to pay for the same on the 15th day of October, A. D. 1865, a voucher, in the customary form of quartermaster's voucher, was made out by Captain P. T. Turnly, of the United States Quartermaster's department, for the sum of $4, 116.20, in payment for said corn, and delivered to your petitioner, whereby the United States became liable to pay the amount of said voucher to your petitioner, and in consideration thereof promised your petitioner to pay the same according to the tenor thereof. A copy of said contract and said voucher, marked Exhibits A and B, is annexed to this petition and made a part of the same. That said voucher has been presented to the Quartermaster-General and to the proper officer of the United States for payment and payment demanded, but payment thereof was refused. To recover the contents of said voucher, to wit, the sum of $4, 116.20, your petitioner brings this suit.

And your petitioner further avers that he is a loyal citizen of the United States; that he never gave any aid or comfort to the rebellion against the United States or encouragment to the same; that he is the sole owner of said voucher and claim, never having made any assign-

ment thereof; and that he is not in any manner indebted to the United States.

FREDERICK Z. SALOMON,
P. O. Address, Denver City.
By T. J. D. FULLER,
His Attorney with special power.

3 Washington City, January 1, 1870, personally appeared T. J. D. Fuller, and made oath that, according to his best knowledge, information, and belief, the matters and things set forth in the above petition are true.

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

EXHIBIT A.

Articles of agreement entered into this twenty-eighth day of July, eighteen hundred and sixty-four, between Captain Loudon Mullin, assistant quartermaster and officer in the service of the United States of America, of the one part, and Fred. Z. Salomon, of the county of Arapahoe, in the Territory of Colorado, of the other part.

This agreement witnesseth:

That the said Captain Loudon Mullin, for and on behalf of the United States of America, and the said Frederick Z. Salomon, for himself, his heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree, to and with each other, as follows, viz:

First. That the said Fred. Z. Salomons, his heirs, executors, or administrators, shall deliver to the commanding officer at Camp Fillmore, C. T., twelve thousand bushels of good, sound, merchantable corn, well matured, to weigh 56 lbs. to the bushel, to be in good, well-sewed sacks, subject to the inspection of the officer receiving the corn.

Second. That the said Fred. Z. Salomon, his heirs, executors, or administrators, shall deliver at such times and in such quantities, of not less than one thousand bushels per month, as the assistant quartermaster may direct, nine thousand bushels before the 1st day of January, and the whole amount of twelve thousand bushels by the 1st of May, 1865, delivery to commence September 1, 1864.

Third. The said Fred. Z. Salomon shall receive the sum of twelve cents per pound for the corn delivered and accepted under this contract.

Fourth. Payment shall be in the funds furnished by the United States for public disbursement, and for each one thousand bushels, accepted, except the first twelve hundred bushels, for which payment shall be
4 withheld, until the whole amount shall have been delivered and accepted; but in the event of the quartermaster who receives the corn being without funds to pay for it, then payment to be made as soon after as funds may be received for that purpose.

Fifth. In case of failure or deficiency in the quantity or quality of the corn stipulated to be delivered, then the assistant quartermaster at Denver shall have power to supply the deficiency by purchase, and the said Fred. Z. Salomon will be charged with the difference of cost.

Sixth. No member of Congress, officer, or agent of the Government, or any person employed in the public service, shall be admitted to any share herein or to any benefit which may arise herefrom.

In witness whereof the undersigned have hereunto placed their hands and seals the day and year above-written.

LOUDON MULLIN, [L. S.]
Captain and A. Q. M.
FREDERICK Z. SALOMON. [L. S.]

Witnesses:
J. O. WHITTEMORE.
J. D. SIMPSON.

Know all men by these presents that we, Frederick Z. Salomon, Abra. Hanaŋer, Charles A. Cook, George T. Clark, and John Martin, of Denver, in the county of Arapahoe and Territory of Colorado, are held and firmly bound to the United States of America in the sum of $10,000, lawful money of the United States; for which payment, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, for and in the whole, jointly and severally, by these presents, sealed with our seals, dated this 28th day of July, in the year of our Lord 1864.

The nature of the above obligation is such, that if Frederick Z. Salomon, his heirs, executors, and administrators, or any of them, shall and do, in all things, well and truly observe, perform, fulfill, accomplish, and keep, all and singular, the covenants, conditions, and agreements whatsoever which, on the part of the said Frederick Z. Salomon, his heirs, executors, or administrators, are or ought to be observed, performed, fulfilled, accomplished, and kept, comprised or mentioned in certain articles of agreement, bearing date the 28th day of July, 1864, between Captain Loudon Mullin, assistant quartermaster, and the said Frederick Z. Salomon, concerning the supply of corn at Camp Fillmore, according to the true intent and meaning of said articles of agreement, then the above obligation to be void; otherwise to remain in full force and virtue.

FREDERICK Z. SALOMON, [L. S.]
Of Denver, C. T.
ABR. HANAŋER, [L. S.]
Of Denver, C. T.
CHARLES A. COOK, [L. S.]
Of Denver, C. T.
GEORGE T. CLARK, [L. S.]
Of Denver, C. T.
JOHN H. MARTIN. [L. S.]

Witnesses:
J. A. WHITTEMORE.
J. D. SIMPSON.

ABSTRACT A, QR. 186—.

The United States to Fred. Z. Salomon, Dr.

DENVER, C. T., *Oct.* 15, 1865.

For (37,420) thirty-seven thousand four hundred and twenty pounds, being $668\frac{12}{56}$ bushels of corn, at 11 cents per lb. .. $4,116 20

Delivered on contract between L. Mullin, A. Q. M., on behalf of the United States, and the said Fred. Z. Salomon, dated July 28, 1864. The corn was required to subsist public animals hauling supplies from Camp Fillmore, C. T., to Denver, C. T. The contract is now completed and closed.

I certify that the above account is correct and just, and that the articles have been accounted for on my property return for the month ending on the 30th of November, 1865.

P. T. TURNLEY,
Assistant Quartermaster U. S. A.

True copy:

L. C. EASTON,
Brevet Major-General C. Q. M.

Received, at , the of , 186 , , quartermaster, United States Army, the sum of dollars and cents, in full of the above account.

(Signed in duplicate.) FREDERICK Z. SALOMON.

6 Endorsements.

By request of Captain Turnley, this account is refused payment, he having ascertained that this last delivery is not satisfactory.

This delivery is not in accordance with the contract as to date and place. Authority must be shown for this departure from the conditions of the contract.

CHIEF QUARTERMASTER'S OFFICE, DEP'T MO.,
December 28, 1865,

Forwarded by Colonel Howard, August 25, 1866.

In accordance with contract, except as to date and place of delivery.

J. D. TREADWAY, *A. Q. M.*

DECEMBER 28, 1865.

Cancelled. (See letter with enclosure from Colonel J. B. Howard, A. Q. M., to General L. C. Easton, dated February 15, 1866.)

HEADQUARTERS DEPARTMENT MISSOURI,
St. Louis Mo., April 6, 1866.

Upon information received from Brevet Major S. B. Bean, acting quartermaster at Denver, C. T., dated February 7, 1866, and from Brevet Colonel J. B. Howard, chief quartermaster district of Colorado, dated February 15, 1866, this account is refused payment at this office.

In my opinion the evidence that Mr. F. Z. Salomon has produced, is not such as to justify a reversal of the decision of the board of survey, that this voucher should be cancelled and not paid, convened at Denver by S. O. 55, headquarters district of Colorado, dated December 10, 1865.

L. C. EASTON,
Brevet Brig.-Gen., Chief Q. M.

7 QUARTERMASTER GENERAL'S OFFICE,
April 26, 1866.

The action of the board of survey approved. Payment can be made for 5,991 pounds corn, (five thousand nine hundred and ninety-one pounds corn,) at contract price.

Balance of voucher cannot be paid.

By order of the Quartermaster-General.

S. L. BROWN,
Brevet Brig.-Gen., Ch'g Div. Reg. Sup'l.

HEADQUARTERS DEP'T MISSOURI,
Fort Leavenworth, June 7, 1867.

By the decision of a board of survey, convened at Denver, C. T., by Spec. Ord. No. 55, from headquarters district of Colorado, dated December 10, 1865, this voucher was to be cancelled, (the corn being bad when received, and a new voucher was to be issued for 5,991 pounds corn, at 11 cents per pound. The new voucher has been issued, (copy filed herewith,) and this voucher is accordingly cancelled, and will be retained in this office.

L. C. EASTON,
Brevet Maj.-Gen., Chief Q. M.

QUARTERMASTER GENERAL'S OFFICE,
Washington, D. C., January 10, 1870.

T. J. D. FULLER, Esq.,
Washington, D. C.

SIR: Your communication of the 7th inst., requesting a copy of the voucher issued to Frederick Z. Salomon, by Captain P. T. Turnley, under date of October 15, 1865, for $4,116.20, has been received.

Referring thereto, I have the honor to enclose herewith an official copy of the voucher referred to, the necessary authority having been granted by the Secretary of War.

Very respectfully, your obedient servant,
By order Acting Quartermaster-General.

JAMES A. EKIN,
Deputy Q. M. Gen., Brevet Brig.-Gen. U. S. A.

(Indorsed:) Petition. No. 6130. Fred. Z. Salomon vs. United States. Filed January 4th, 1870. T. J. D. Fuller, attorney.

8 In the United States Court of Claims. December term, A. D. 1869.

FREDERICK Z. SALOMON
vs.
THE UNITED STATES. } No. 6130.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of forty-one hundred and sixteen dollars and twenty cents, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

THOM'S H. TALBOT,
Assistant Attorney-General.

Filed March 9, 1870. J. R.

9 In the Court of Claims.

FREDERICK Z. SALOMON
vs. } 6130.
THE UNITED STATES.

At a Court of Claims held at the Capitol in the city of Washington, first day of April A. D. 1872, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said Frederick Z. Salomon have and recover of and from the United States, the sum of six hundred and fifty-nine dollars and one cent ($659.01).

By the court.

10 In the United States Court of Claims.

FREDERICK Z. SALOMON
vs. } 6130.
THE UNITED STATES.

From the judgment in the above cause of this court, claimant, by his attorney, appeals to the Supreme Court of the United States, and prays for an allowance of the same.

By his att'y.

T. J. D. FULLER.

Filed April 8, 1872.

Ordered, that the appeal be allowed as prayed for.

By the court.

APRIL 8, 1872.

11 Court of Claims.

F. Z. SALOMON
vs. } 1.
UNITED STATES.

The court finds the facts in this case to be as follows:

1. On the 28th July, 1864, the defendants, through their assistant quartermaster, entered into the written contract with claimant, which is described in, & annexed to, the petition.

On the 1st May, 1865, there had been delivered on account of the said cont act, only about nine thousand bushels of corn, for all of which the defendants have paid, and as to which there is no dispute. In September, 1865, the claimant applied to Captain Turnley, the chief quartermaster of the Department of the Plains, at his office in Denver, (he being the successor of the quartermaster who entered into the contract,) to receive the undelivered balance of the corn.

The chief quartermaster at first declined, but learning that Camp Fillmore was about to be broken up, & that he would immediately need corn to subsist his transportation trains, he determined to receive so much of the claimant's corn as might be sufficient for that purpose, & to that end requested him to deliver about six hundred bushels

12 within thirty days, it being at the same time stipulated by the claimant, that if he should so deliver six hundred bushels within

the specified time, he might deliver new corn. Thereupon, the claimant, by his agents, proceeded to Camp Fillmore, & on the 15th October, 1865, completed the delivery, in the military storehouse of that place, of the 37,420 pounds of corn referred to in the petition. The corn was so placed in the warehouse, without the authority or knowledge of the commanding officer at Camp Fillmore.

II. There being no quartermaster at Camp Fillmore, as the post was in process of being broken up, the chief quartermaster sent his clerk from Denver, to take charge of the Government stores & property there. On the 19th October, 1865, he instructed him by letter with regard to the claimant's corn:

"As to the corn of Mr. Salomon's, you can examine and see that it is good sound corn, put up in good sacks; but do not receive it until further orders."

And on the 22d October, he further instructed him:

"You will not receive any on Salomon's old (and long since expired) contract."

13 And on the 30th October he further instructed him:

"Should you require more corn, you may receive some of his corn, giving him receipt for the same."

And on the 1st November he further instructed him:

"Salomon's corn, near Fillmore, I have directed you in previous letter not to receive on his contract; but in still later letter I did direct you to receive for current use, at contract price—so far as your public teams required—you will do this, and render acc't of the am't."

These instructions were not communicated to the claimant; but on the 6th November, 1865, the chief quartermaster's clerk examined the claimant's corn in the military storehouse, but did not critically examine it, to see if it was good sound corn. But he weighed some of the sacks, & counted the remainder, toward the ascertainment of the weight. And he thereupon executed & delivered to the claimant the following receipt; which the claimant accepted & took, to wit:

"BOONEVILLE, C. T., *Nov.* 6, 1865.

"Received at Gov't storehouse at Camp Fillmore, C. T., of J. H.
14 Hayden, agent for J. Z. Salomon, thirty-eight thousand and eighty-four pounds of corn, to complete his contract made with the United States, and dated July 28, 1864.

"C. L. RUTTER,
"*Q. M., Ag't for Capt. P. T. Turnley, A. Q. M. U. S. A.*"

And the chief quartermaster's clerk, at the same time, accepted & took the actual possession & custody of the corn. But it was not further inspected by him, nor by any officer of the defendants. The claimant, shortly after receiving the receipt before set forth, presented it to the chief quartermaster at Denver, & received from him the voucher described in & annexed to the petition, which he accepted. The chief quartermaster, at the time of giving the voucher, had no personal knowledge of the transaction, & acted upon the receipt of the clerk.

III. Of the corn thus sold & delivered, a portion was used in the military service of the defendants; a portion was transported by them, during the month of December, 1865, to Denver, and the remainder was left at Camp Fillmore.

After the arrival of that transported to Denver, some of it
15 was found to be shrunken & shrivelled, & some portions had rotted, & others were mixed with dirt; whereupon the defend-

ants' disbursing officers refused to pay the voucher held by the claimant, and the quartermaster tendered to him, at Denver, the portion of the corn transported there, but the defendants did not return or offer to return the same to Camp Fillmore.

The Government store-house at Camp Fillmore in which the corn was kept after its delivery was defective & leaky, & the corn was injured while there. But it was good, sound, merchantable corn when it was placed there by the claimant.

IV. The defendants have never paid for the corn before described, nor for any part thereof.

V. The quantity of corn delivered at Camp Fillmore & receipted for by the clerk of the chief quartermaster was 38,084 pounds, the quantity shown by the defendants to have been tendered to the claimant
16 at Denver was 10,000 pounds. The quantity remaining at Camp Fillmore is not shown.

In pursuance of the order of a court of survey, Major Bean, assistant quarter , at Denver, on or about the 7th February, 1866, tendered to the claimant's agent a voucher for the quantity of corn used by the animals, during the transportation, amounting to $659.01, at eleven cents a pound. The claimant, by his agent, refused to receive it.

Upon the foregoing facts the conclusion of law is, that the claimant is entitled to recover for the quantity of corn used by the Government, viz, 5,991 pounds, at 11 cents per pound, being $659.01.

By the court.

(Indorsed:) F. Z. Salomon vs. United States. Finding of facts.

17 United States Court of Claims. Dec. term, 1871.

FREDERICK Z. SALOMON
vs.
THE UNITED STATES. } 6130.

And now comes the defendants, by the Attorney-General, & asks that the court find the following facts in the above cause:

1. Capt. Turnley, A. Q. M. U. S. A., in October, 1865, informed Charles L. Rutter, by letters, that, if he required more corn, for the use of the Government stock at Camp Fillmore, he could receive some of Salomon's (claimant) corn at that place, and specified that it should be good sound corn, put in good sacks.

2. Rutter was Capt. Turnley's clerk, and not a commissioned officer of the United States Army, and was only authorized to take the amount of corn that was required.

3. The corn in question was placed in the jacal by the claimant of his own accord.

4. In consequence of a pres'ure of business, and the statement
18 of the claimant or his agent at the time, Rutter was induced to give the receipt for the corn, without having made an examination sufficient to enable him to know what was the number of bushels and the condition of the corn.

5. Capt. Turnley gave the voucher for the whole amount of the corn on the representation of Rutter.

6. The season of the year, between the time of giving the receipt and the examination by the board of survey, was such that corn could not heat or spoil.

7. The board of survey and other witnesses who examined the corn

both at Camp Fillmore and Denver found it to be unmatured, shriveled, and unmerchantable, and were of opinion that it was so when Rutter receipted for it.

8. The corn was not in quality according to contract expressed or implied.

9. It was not accepted by the defendants for, as soon as the quality was ascertained by its responsible agent, it was rejected.

10. The claimant received notice to remove the corn, and, for his accommodation, it was allowed to remain in the Government ware-
19 house, with the understanding that it was not to be considered that the defendants had accepted.

W'M MCMICHAEL,
Ass't Att'y-Gen'l.

JANUARY 16, 1872.

Upon the foregoing findings prayed by the defendants, the court make' the following endorsement, to wit:

Refused, because embodied in the finding of facts prepared by the court, so far as sustained by the evidence.

By the court.

20 In the Court of Claims.

FREDERICK Z. SALOMON
vs.
THE UNITED STATES. } No. 6130.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judement of the court thereon; of the application of the claimant's counsel for the allowance of an appeal, as filed in the clerk's office, April 8th, 1872, and of the order of the court of 8th April, 1872, allowing the same; of the finding of facts and conclusion of law thereon on which the court founded its judgment; and also of the prayer for findings by the defendants' counsel and the refusal of the same by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of April, A. D. 1872.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 378. Frederick Z. Salomon, appellant, vs. The United States. Court of Claims. Filed 10 April, 1872.

REC. 378—2

UNITED STATES SUPREME COURT

F. Z. SALOMONS
vs.
THE UNITED STATES.

No. 665

CLAIMANT'S BRIEF.

I.

The appellant was under contract to deliver at Camp Fillmore, to the United States, twelve thousand bushels of corn, between the 1st day of September, 1864, and first of May, 1865, at such times and in such quantities, monthly, as the quartermaster might direct. Nine thousand bushels were delivered within the time specified, and were paid for. Three thousand bushels remained to be delivered to complete the full complement of the contract. Why the full quantity was not delivered within the time limited does not appear in the case. No complaint is made by either party of the non-delivery, nor does it appear in any manner that the contract was closed, or treated as closed. For aught appears, the United States received all they wished, up to the 1st of May. Certain it is, no complaint was made. In September plaintiff offered (forepart September, 1865,) to deliver the balance of the corn, due on the contract, and the chief quartermaster of the department determined to receive six hundred bushels on the contract, *provided* it was delivered in thirty days. The claimant thereupon delivered at Camp Fillmore 37,420 lbs. of corn, the quantity, within the time required. It was delivered and placed, where the corn previously delivered, had been placed. The case finds there was no officer in charge of Camp Fillmore at the time of its delivery.

II.

The contract was authoritatively made, in strict compli-
[redacted]

Parol evidence of the enlargement of the time of performance, in a written contract, is admissible in evidence.

See Emerson *v.* Slater, 22 How., p. 42.

By implication, or necessary intendment, here was an extension of time for the delivery of the corn.

The error of the court below, in their conclusions of law, is that the decision is in conflict with the rulings and decisions of this court in the case of Lyon *v.* Bertram, 20 How., p. 149.

The contract, so far as the corn in question is concerned, was an entire one, and the acceptance and use of a part, and the hauling of the balance, (with a difference of a small quantity left in Camp Fillmore,) one hundred and fifty miles to Denver City, was an acceptance of the whole.

The court find the fact to be, that the quality of the corn, when delivered, was of the quality called for in the contract—good, sound, merchantable corn. That the corn subsequently became injured by reason of the insufficient protection of the Government storehouse. It was a jacall, without flooring or covering, save of polls and earth.

The Government could not rescind the contract as to part and not the whole: acceptance of part was acceptance of the whole. The offer to return a part in a damaged condition, one hundred and fifty miles from the place of delivery, was without law and authority.

The reduction of claimant's voucher was wholly illegal and unauthorized. He has constantly refused to receive any part of his voucher without getting the whole of it.

III.

The trouble in this case arose wholly from the mistaken and *ex parte* proceedings of a military board of survey in February, 1866, at Denver city, under paragraph 1019 of the Army Regulations.

Supreme Court of the United States.

FRED. Z. SALOMONS, Appellant,
vs.
THE UNITED STATES, Appellee.

ASSIGNMENT OF ERRORS.

1. The court erred in holding, as matter of law, that the corn delivered at Camp Fillmore, and for which pay is claimed, was not a legal and valid delivery under the contract of July 28th, 1864, set out in the record.

2. It erred in holding the contract of July 28, 1864, was not a subsisting contract at the time the corn was delivered under it, in October, 1865.

3. It erred in holding, upon the state of facts found to be proven, that the claimant was not entitled to pay for all the corn he delivered at Camp Fillmore.

4. It erred in holding that the claimant was not entitled to recover pay for all the corn the defendants received and hauled away from Camp Fillmore.

5. It erred in its general conclusion of law upon the whole state of facts found, as held by this court in the case of Lyon *v.* Bertram *et al.*, 20 How., page 149, that the claimant was not entitled to recover pay for the full quantity of 37,420 lbs. of corn delivered, but for only 5,991 lbs. of corn.

T. J. D. FULLER,
Attorney.

These proceedings look to the condemnation of the *property of the United States*, as unserviceable and unfit for use, and to fix the proper responsibility for the deterioration of the property of the United States.

The board can have no jurisdiction over property not belonging to the United States. The question of jurisdiction is limited to inquire into the condition of property belonging to the United States, the title to which is vested in the United States.

The board of survey undertook to determine the condition of the corn at Denver, in February, 1866, and they decide, to have the corn returned to the contractors, assuming to rescind the contract in part, and offering to return the balance to the claimants at Denver. In other words, to determine the corn did not belong to the United States, was not its property, and summarily seize the claimant's voucher, and reduce it down to the quantity consumed and fed to the public animals.

If the title of the corn had not vested in the United States, and was not the property of the United States, and in the hands of its accounting officers, it is quite difficult to perceive, what jurisdiction or authority a military board of survey had to act upon it. But, acting upon it, they could only determine, its condition and fitness for use, and if unserviceable or unfit for use, by whose fault it became so; and there ended their authority. But when they proceeded to determine whether the corn belonged to the United States, and to decide it did not, and to order its return to the claimants, their doings were very clearly *coram non judice.*

Here was the source and origin of the dispute. That the corn became injured after its delivery and acceptance, and use of a portion of it, there is but little doubt.

But this does not relieve the United States from paying for it, any more so, than for any supplies, that have been injured by storage, or other casualty.

T. J. D. FULLER,
For Claimant.

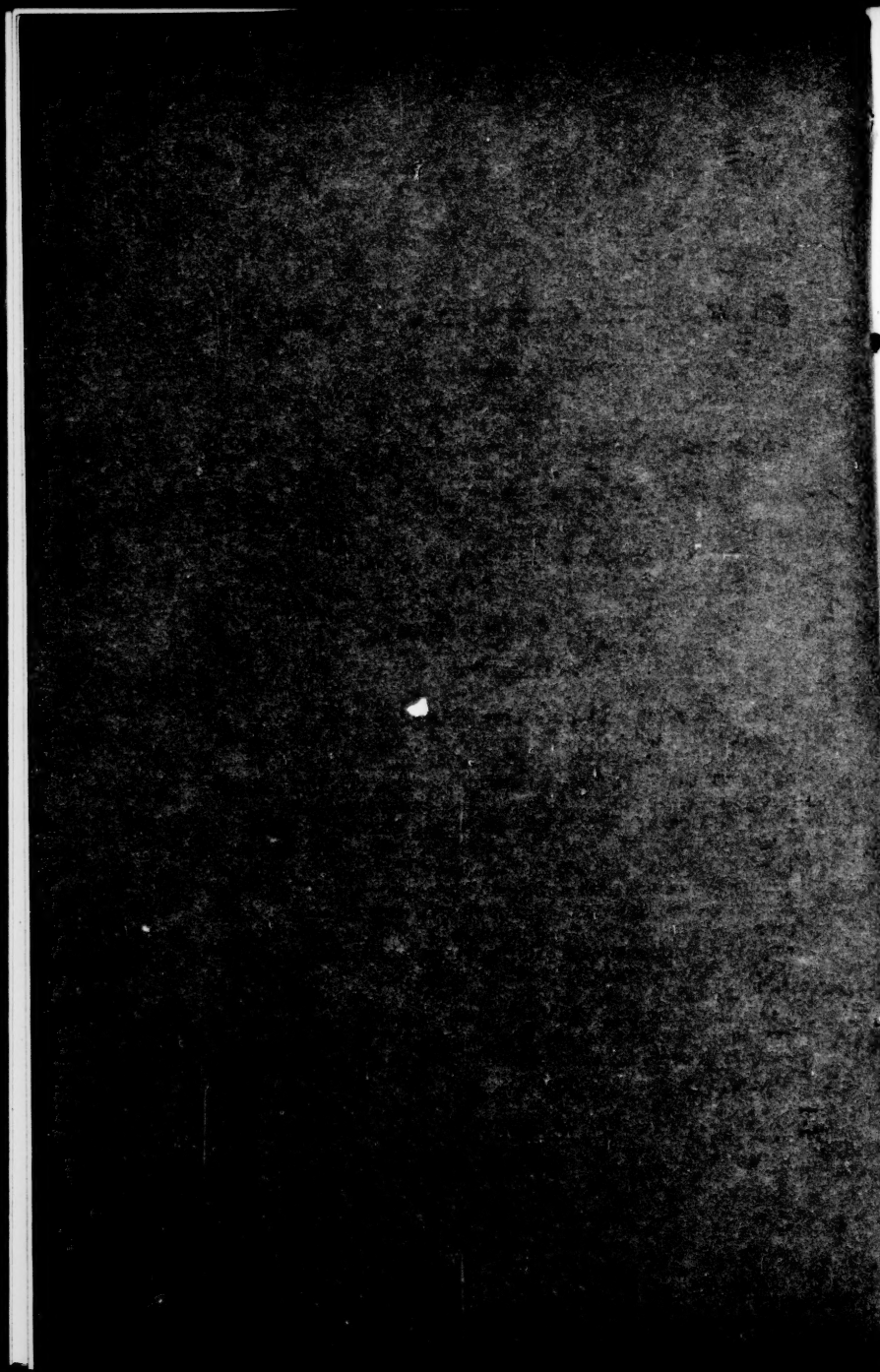
In the Supreme Court of the United States.

OCTOBER TERM, 1873.

FREDERICK Z. SALOMON, APPELLANT,
vs.
THE UNITED STATES. } No. 165.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.



In the Supreme Court of the United States.

OCTOBER TERM, 1873.

FREDERICK Z. SALOMON, APPELLANT,
vs.
THE UNITED STATES. } No. 165.

APPEAL FROM THE COURT OF CLAIMS.

Brief for the United States.

STATEMENT.

The claimant and appellant entered into an agreement on the 28th of July, 1864, with Captain Loudon Mullin, of the Quartermaster's Department, whereby he agreed to deliver to the commanding officer at Fort Fillmore twelve thousand bushels of sound, merchantable corn, well matured, to be in good, well-sewed sacks, "subject to the inspection of the officer receiving the corn." This was to be delivered "at such times and in such quantities, of not less than one thousand bushels per month, as the assistant quartermaster may direct, nine thousand bushels before the first day of June, and the whole amount of twelve thousand bushels by the 1st of May, 1865, delivery to commence September 1, 1864." (Rec., p. 2.)

On the first day of May, 1865, there had been delivered on account of said contract only nine thousand bushels of corn, for all of which the claimant was paid,

and about which there is no dispute. In September, 1865, the claimant applied to Captain Turnley, the chief quartermaster of the Department of the Plains, at his office in Denver, (he being the successor of Captain Mullin,) to receive the rest of the grain. He at first declined, but learning that Camp Fillmore was about to break up and that he would need the grain for his transportation trains, he determined to receive so much of the claimant's corn as might suffice for that purpose, and to that end requested him to deliver about six hundred bushels within thirty days, it being at the same time stipulated by the claimant that, if he should so deliver six hundred bushels within the specified time he might deliver new corn. Thereupon the claimant proceeded to Camp Fillmore, and on the 15th of October, 1865, completed the delivery at Camp Fillmore in the military storehouse of that place, of the 37,420 pounds of corn which is the subject of this suit. The corn was placed in the warehouse without the authority of the commanding officer at Camp Fillmore.

There being no quartermaster at Camp Fillmore, the chief quartermaster sent his clerk from Denver to take charge of the Government stores and property there. On the 19th of October, 1865, he instructed him by letter, in respect of the claimant's corn: "As to the corn of Mr. Salomon's you can examine and see that it is good, sound corn, put up in good sacks; but do not receive it until further orders."

On the 22nd of October he further instructed him: "You will not receive any on Salomon's old (and long since expired) contract."

And on the 30th of October, he further instructed him: "Should you require more corn you may receive some of his corn, giving him receipt for the same."

And on the 1st of November, he further instructed him: "Salomon's corn, near Fillmore, I have directed you in previous letter not to receive on his contract, but in still later letter I did direct you to receive for current use, at contract price, so far as your public teams require. You will do this and render account of the amount."

These instructions were not communicated to the claimant, but on the 6th of November, 1865, the clerk examined the claimant's corn in the military storehouse, but did not critically examine it to see if it was good, sound corn; but he weighed some of the sacks and counted the remainder toward the ascertainment of the weight, and he thereupon executed and delivered to the claimant a receipt for the same. (Rec., p. 7.)

The chief quartermaster's clerk accepted and took actual possession of the corn; but it was not further inspected by him nor by any officer of the defendants. The claimant shortly after receiving the receipt presented it to the chief quartermaster at Denver, and received from him the voucher annexed to the petition, and which is printed in the record, pp. 3–4. The chief quartermaster at the time of giving the voucher had no personal knowledge of the transaction, and acted upon the receipt of the clerk.

Of the corn thus sold and delivered a portion was used in the military service of the defendants, a portion was transported by them during the month of December, 1865, to Denver, and the remainder was left at Camp Fillmore. Some of that transported to Denver was found on its arrival to be shrunken and shrivelled, and some parts of it had rotted, and other parts were mixed with dirt; whereupon the defendants' disbursing officers refused to pay the voucher held by the claimant, and the quartermaster tendered to him at Denver the portion of the corn transported there; but the defendants did not return or offer to return the same to Camp Fillmore.

The Government storehouse at Camp Fillmore, in which the corn was kept after its delivery, was defective and leaky, and the corn was injured while there. But it was good, sound, merchantable corn when it was placed there by the claimant.

The defendants have never paid for the corn described, nor for any part thereof.

The quantity of corn which was tendered to the claimant at Denver was ten thousand pounds. The quantity remaining at Camp Fillmore is not shown.

The claimant was tendered a voucher for the quantity of corn used by the animals during the transportation, amounting to $659.01, which he refused to receive.

Upon the above facts the Court of Claims gave judgment for the claimant for $659.01, and he appealed.

ARGUMENT.

The claimant cannot recover for the corn for which this suit is brought under the original contract, as that was ended by his failure to deliver the corn mentioned therein within the time specified.

Whether stipulations as to time for the performance of a contract of sale are conditions precedent, is a question to be determined by a fair examination of the language of the contract, the subject-matter of the same, and the circumstances of its execution. If from these the time appears to be of the essence of the contract, stipulations in regard to it are treated as conditions precedent to the sale.

Benjamin on Sales, pp. 481, 482.

In the contract made between the claimant and Captain Mullin in this case, it is very clear, both from the language and from the circumstances of the case, that time was of the essence of the contract. The subject-matter of the contract was the delivery of grain at a military post; and it needs no argument to show how essential it is that the Government shall be able to know when the grain for which they contract is to be delivered, and in what quantities. Besides this, the covenants in this case are declared to be mutual, and the provision for the delivery of the grain is very specific. Nine thousand bushels were to be delivered before the first day of January, and the whole amount by the first day of May, 1865, the delivery to begin September 1, 1864.

The findings of the court below in regard to the agreement between Captain Turnley and the claimant, and the instructions from Captain Turnley to the clerk at Camp Fillmore, prove conclusively that this was not treated or accepted as a performance of the expired contract.

If, therefore, there was any agreement by the quartermaster to buy the grain mentioned in the claimant's petition, it was an oral contract, and contrary to the act of 1862, ch. 93, (12 U. S. Stat., 411,) requiring all such contracts to be in writing. Neither were there the conditions necessary to make a valid contract under the act of 1861, ch. 84, (ibid, 220,) requiring contracts for supplies, except in special emergencies to be made by advertising for proposals, and the act of 1864, ch. 253, sec. 4, (13 U. S. Stat., 396,) directing that where an emergency requires an immediate procurement of supplies, the contract shall be made by the chief quartermaster of the Army or detachment.

Nor was there any delivery or acceptance of this corn to render the Government liable upon an implied contract. The grain was placed in the warehouse at Camp Fillmore without authority. The clerk was expressly directed not to receive the corn, but only to receive for current use at contract prices.

Whatever there may have been in the action of the chief quartermaster's clerk contrary to these instructions, was wholly unauthorized, and could not bind the Government.

The corn transported to Denver was not in good condition. As the Government never accepted the corn while it was in Camp Fillmore, it must be considered as having been at the claimant's risk; and he, as the owner, no title having passed, must bear the loss of any damage which it may there have received.

The receipt and voucher given can at most be considered as only *prima facie* evidence, and are contradicted by the findings of the court below. See *Parrish* vs. *The United States*, 2 Court of Claims R., 341.

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